LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-330

COUNTY ASPHALT, INC.,

Petitioner,

against

THE LEWIS WELDING & ENGINEERING CORPORATION,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Respondent ("Lewis") in its opposing brief in No. 330 has raised as a new matter the issue of the jurisdiction of the Court of Appeals for the Second Circuit, and therefore of this Court, over the action. Petitioner ("County Asphalt") submits this reply memorandum to demonstrate that Lewis' contention is without merit.* U. S. Sup. Ct. Rule 24(4), 28 U.S.C. (1970).

In brief, Lewis contends that the Court of Appeals for the Second Circuit never obtained jurisdiction over this action because County Asphalt prematurely filed its notice of appeal while motions to amend the judgment of the District Court for the Southern District of New York were still pending. In the Court of Appeals, Lewis moved

* County Asphalt also disputes one of Lewis' factual claims. Lewis is completely mistaken when it suggests that County Asphalt abandoned its claim of error with respect to the trial court's instructions to the jury (Resp. Br. p. 16). Not only did County Asphalt brief this very point to the Court of Appeals (App. Br. Point IV D), but its attorney expressly reaffirmed this position at commencement of the oral argument.

to dismiss the appeal for lack of jurisdiction, and, after its motion was summarily denied, unsuccessfully reasserted its contention in its answering brief.

Neither in its brief in opposition to the petition nor in the Court of Appeals did Lewis assert that the timing of County Asphalt's notice of appeal caused Lewis any prejudice. Nor has Lewis asserted that it did not know of County Asphalt's intent to appeal the judgment of the District Court. On December 18, 1970, a short time after the opinion amending the judgment was entered (no amended judgment was ever entered), Lewis demanded, and County Asphalt filed, a supplemental supersedeas bond to cover the award of interest given Lewis in that decision. Thereafter, in accordance with Fed. R. App. P. 30(b), County Asphalt designated the parts of the record on appeal to be included in the appendix and gave notice of the issues on appeal. Lewis then cross-designated additional parts of the record on appeal to be included in the appendix. It was only after County Asphalt served its brief and the joint appendix that respondent moved to dismiss the appeal as premature.*

Because Lewis was neither misled nor prejudiced by the timing of the notice of appeal, it is clear that the Court of Appeals had jurisdiction under this Court's latest holding on this issue in *Foman* v. *Davis*, 371 U.S. 178 (1962). Each decision cited by Lewis for its conclusion that the Court of Appeals did not have jurisdiction was decided before 1962 and has thus been overruled *sub silentio* by *Foman*. In *Foman*, the plaintiff appealed the judgment dismissing its complaint while its motion to vacate and amend the judgment was pending. After its motion was denied, plaintiff appealed again, but only from the order of dismissal, not the original judgment. The Court of Appeals dismissed the appeal on its own motion on the grounds that:

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* These undisputed facts are set forth in the affidavit of William E. Kelly, Esq., in opposition to Lewis' motion to dismiss the appeal.

(1) the first notice of appeal was premature because motions to amend the judgment were pending and (2) the second notice of appeal specified that plaintiff was appealing only from the order denying the motion to vacate the judgment, not from the original judgment. This Court, after noting that the defendant was not misled or prejudiced, held that:

> "Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest . . . .
>
> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 371 U.S. at 181.

Respondent attempts to distinguish *Foman* on the ground that petitioner did not appeal from the amended judgment. That distinction is invalid for two reasons. First, no amended judgment was ever entered in the District Court. Therefore the filing of a second notice of appeal was impossible. Second, each circuit which has decided this issue since *Foman* has employed that decision to uphold the validity of an appeal made while post-judgment motions are pending in the trial court. The facts and holding in *Song Jook Suh* v. *Rosenberg,* 437 F.2d 1098 (9th Cir. 1971), are exactly in point. There plaintiff appealed while its motion for a new trial was pending. Plaintiff did not appeal again after its motion was denied. The Court of Appeals held it had jurisdiction under *Foman* because, as in the case at bar, no prejudice resulted to defendant. In *Song Jook Suh*, the Ninth Circuit went further and overruled two prior decisions, *Segundo* v. *United States,* 221 F.2d 296 (9th Cir. 1955), and *Reconstruction Finance Corp.* v. *Mouat,* 184 F.2d 44 (9th Cir. 1950), on the ground, among others, that *Foman*

and the decisions following it eliminated technical objections to appellate jurisdiction in the absence of prejudice.* Other Ninth Circuit decisions have likewise accepted the *Foman* rationale instead of Lewis' position. *See Eason* v. *Dickson,* 390 F.2d 585 (9th Cir. 1968), *cert. denied,* 392 U.S. 914 (1968); *Curtis Gallery & Library Inc.* v. *United States,* 388 F.2d 358 (9th Cir. 1967); *Ruby* v. *Secretary of the United States Navy,* 365 F.2d 385 (9th Cir. 1966); *Firchau* v. *Diamond National Corp.,* 345 F.2d 269 (9th Cir. 1965). The Fifth and Sixth Circuits have also followed County Asphalt's position. *Markham* v. *Holt,* 369 F.2d 940 (5th Cir. 1966); *Keohane* v. *Swarco Inc.,* 320 F.2d 429 (6th Cir. 1963). Since the *Foman* decision, no court, to the best of petitioner's knowledge, has adopted Lewis' position and, accordingly, County Asphalt submits that this Court has jurisdiction to hear the petition on the merits.

Respectfully submitted,

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* Lewis relied on *Reconstruction Finance Corp.* v. *Mouat, supra,* below in support of its motion to dismiss. That it has now been overruled demonstrates the weakness in Lewis' argument.